STATE OF MICHIGAN

COURT OF APPEALS

LYNNE KAREN NERELL, Plaintiff-Appellee,	UNPUBLISHED June 18, 2013
v	No. 310912 Kalamazoo Circuit Court
WILLIAM BARRY BOND, Defendant-Appellant.	LC No. 93-002388-DM

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion to modify or terminate spousal support. The trial court initially determined that the award of spousal support in the judgment of divorce was modifiable, and a three-day evidentiary hearing on defendant's motion was conducted. Thereafter, the trial court reversed its position, ruled that the spousal support award was nonmodifiable, and denied defendant's motion absent substantive examination of its merits. We reverse and remand for further proceedings.

The parties were married in October 1975 and had four children. Plaintiff filed for divorce in August 1993. The parties almost immediately reached a settlement agreement, pursuant to which plaintiff was to be awarded sole legal and physical custody of the minor children, along with $225 per week in child support. The custody and child support provisions were later incorporated into the judgment of divorce that was entered in February 1994. Additionally, with respect to spousal support, the divorce judgment provided, consistent with the settlement agreement, as follows:

> The Husband shall pay to the Wife through the Friend of the Court for her support and maintenance the sum of $345 per week commencing on the first Friday following the entry of this Judgment. The alimony shall terminate upon the death of the Wife.

In November 2002, defendant filed a motion to modify the judgment of divorce in regard to spousal support, alleging that he "suffered a substantial reduction in his income as a realtor." Plaintiff challenged defendant's motion on the merits, making no claim whatsoever that the award of spousal support in the divorce judgment was nonmodifiable. Following a two-day evidentiary hearing, an order modifying the divorce judgment with respect to spousal support was entered in July 2003, and it provided:

> The Defendant shall pay alimony for Plaintiff to the State Disbursement Unit or the Friend of the Court commencing Friday, November 29, 2002, the sum of $435 per month ($100 per week) payable monthly in advance on the first day of each month, until further Order of the Court. The Friend of the Court shall send the alimony to the Plaintiff or as otherwise provided by law. Defendant's alimony obligation shall terminate upon death of either party and shall be deductible to Defendant and includible to Plaintiff as to all state and federal income tax purposes.

This order was not appealed by plaintiff. Several years later, in July 2009, defendant filed the motion to modify or terminate spousal support which is at issue here. Defendant complained of a continuing decline in his earnings as a realtor, arguing that this constituted a change of circumstances that warranted a further reduction in or the complete elimination of spousal support. In plaintiff's response to the motion, which noted her disabilities due to multiple sclerosis and cancer, she solely challenged defendant's request on the merits. However, in a supporting brief, plaintiff asserted that the spousal support award was nonmodifiable. On the first day of the evidentiary hearing relative to defendant's motion to modify or terminate spousal support, the trial court[1] ruled that the judgment of divorce provided for "life-time alimony that's modifiable in the amount."

After evidence was taken at the evidentiary hearing, which spanned three days, the trial court denied defendant's motion. The court, however, did not base its decision on the substance or merits of defendant's motion. Rather, the court revisited its prior decision regarding spousal support modifiability and altered its position, now concluding that spousal support was nonmodifiable. In support of its ruling, the trial court noted the following provision addressing "debts" in the settlement agreement that had been incorporated by reference into the divorce judgment:

> "The parties agree that if the Husband for any reason shall fail to hold the Wife harmless from any of the debts described herein, the Wife will suffer financial hardship and be unable to adequately support herself. Therefore, the Wife's right to seek additional alimony is reserved to the extent that she is obligated or threatened with suit to pay any marital debt or debt of the Husband herein required to be paid by him."

The trial court ruled that this provision "would not have been inserted if it was not the intention of the parties to have the spousal support award be non-modifiable even though there is no other specific language to that effect in either the [settlement] agreement or the [divorce judgment.]" In regard to the modification of support in 2003, the trial court stated that it was too late to correct that error, that plaintiff did not waive her argument of nonmodifiability at the time,

[1] The judge was not the same judge who made the decision to modify spousal support in 2003.

and that law and equity demanded no further reduction in the amount of spousal support set in 2003. Defendant filed a motion for reconsideration, which was denied by the court.[2]

This Court granted defendant's application for leave to appeal. *Nerell v Bond*, unpublished order of the Court of Appeals, entered October 9, 2012 (Docket No. 310912). On appeal, defendant argues that the trial court erred when, contrary to MCL 552.28 and the judgment of divorce, it concluded that the judgment unambiguously provided for nonmodifiable spousal support despite no mention in the judgment that the support was nonmodifiable or that the parties were waiving their statutory right to modify support.[3]

"The trial court's factual findings relating to its decision to modify spousal support are reviewed for clear error." *Thornton v Thornton*, 277 Mich App 453, 458; 746 NW2d 627 (2007). When a lower court's findings are not clearly erroneous, we must then determine whether the dispositional ruling was fair and equitable in light of the facts. *Id.* at 458-459. However, with respect to whether a consent judgment of divorce, which is treated as a contract, provides for modifiable or nonmodifiable spousal support, the matter presents a question of law which is subject to de novo review. *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010).

"On petition of either party, after a judgment for alimony . . ., the court may revise and alter the judgment, respecting the amount or payment of the alimony . . . and may make any judgment . . . the court might have made in the original action." MCL 552.28. Under the statutory language, a court that originally entered an award of spousal support has continuing jurisdiction and "retain[s] the power to make necessary modifications in appropriate circumstances." *Rickner v Frederick*, 459 Mich 371, 379; 590 NW2d 288 (1999). "[T]he statutory power to modify is not dependent on triggering language in the judgment." *Id.* "The modification of an alimony award must be based on new facts or changed circumstances arising since the judgment of divorce." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000).

Here, at the time the judgment of divorce was entered in 1994, the governing case regarding modification of spousal support was *Bonfiglio v Pring*, 202 Mich App 61; 507 NW2d 759 (1993), although we do note that the *Bonfiglio* opinion, which was issued on October 5, 1993, was decided a little more than a month *after* the settlement agreement in the case at bar was reached between the parties. The *Bonfiglio* panel indicated that there was "a conflict among

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[2] In a written opinion on the motion for reconsideration, the trial court rejected a res judicata argument posited by defendant relative to the 2003 modification, noted that defendant "received the tax benefit of the . . . settlement agreement regarding a reduced child support amount," and stated that defendant had enjoyed a benefit "by having his spousal support obligation[,] which was clearly supposed to be non-modifiable[,] reduced from $345 a week to $100 a week." Plaintiff had argued that defendant desired and received, for purposes of a tax advantage, a higher amount attributed to spousal support and a lower amount allocated to child support.

[3] Plaintiff did not submit an appellee brief in response to defendant's application for leave to appeal, nor has plaintiff filed an appellee brief in reply to defendant's brief on leave granted.

panels of this Court regarding whether contingency provisions for the termination of alimony on death or remarriage make the alimony amount unascertainable and thus modifiable periodic alimony." *Id.* at 63. According to the Court, some cases applied a bright-line test "that if the alimony provision contains a contingency for termination in the event of the death of the recipient, then the alimony is deemed to be periodic alimony, which is subject to modification." *Id.* at 63-64 (citation omitted). However, other panels of this Court had "endorsed an approach that focuses on the intent behind the alimony provision, regardless of a remarriage or a survivorship contingency." *Id.* at 64. This Court adopted the latter approach, ruling:

> [T]he inclusion of a survival or a remarriage contingency in an alimony provision does not automatically or conclusively create modifiable periodic alimony rather than nonmodifiable alimony in gross. Instead, when called upon to distinguish between modifiable and nonmodifiable alimony, courts should focus on the intentions of the parties in negotiating a settlement agreement, or of the trial court in fashioning an alimony award, and give effect to that intent. [*Id.* at 65.][4]

Subsequently, in *Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000), this Court, convened and sitting as a special panel, resolved a conflict that had arisen between *Bonfiglio* and *Staple v Staple*, 237 Mich App 805; 603 NW2d 278 (1999), addressing whether the "intent" approach adopted in *Bonfiglio* should continue to be utilized or whether the old bright-line test should be resurrected. This Court held:

> After considering this issue in light of the statutory language of MCL 552.28 and the public policy behind our laws on alimony and the finality of judgment, we adopt a modified approach that allows the parties to a divorce settlement to clearly express their intent to forgo their statutory right to petition for modification of an agreed-upon alimony provision, and to clearly express their intent that the alimony provision is final, binding, and thus nonmodifiable. Of course, MCL 552.28 creates a statutory right in either party to seek modification of alimony. However, like many other statutory and constitutional rights, parties may waive their rights under MCL 552.28. If the parties to a divorce agree to waive the right to petition for modification of alimony, and agree that the alimony provision is binding and nonmodifiable, and this agreement is contained in the judgment of divorce, their agreement will constitute a binding waiver of rights under MCL 552.28. In brief, we opt to honor the parties' clearly expressed intention to forgo the right to seek modification and to agree to finality and nonmodifiability. Our holding is consistent with the trend seen in both the courts

[4] By being the first published opinion on the subject to be decided after November 1, 1990, *Bonfiglio* became binding precedent. See MCR 7.215(J)(1).

> and the legislatures of our sister states. [*Staple*, 241 Mich App at 568-569 (parallel citations omitted).][5]

The *Staple* panel did emphasize that its ruling applied solely to divorce judgments entered pursuant to negotiated settlement agreements and not to the spousal support provisions of a contested judgment, given that MCL 552.28 is always applicable to any spousal support arrangement adjudicated by a trial court where the parties are unable to reach agreement. *Id.* at 569.[6] *Staple* was decided after the divorce judgment was entered here but prior to the order in 2003 that modified the judgment of divorce as to spousal support.

Defendant places much reliance on the decision in *Staple*, contending that there was no language in the divorce judgment that clearly and unambiguously indicated that the spousal support award was nonmodifiable. The trial court, however, found that *Staple* did not have retroactive application, and defendant wholly fails to address the *Staple* retroactivity question. Therefore, given this briefing inadequacy, we shall proceed on the assumption that *Staple* only operated prospectively. It is abundantly clear that if *Staple* were applied to the settlement agreement and divorce judgment, the spousal support award would be modifiable, where there was no express language suggesting that the parties were agreeing to forgo their statutory right to petition for modification or intending to make the spousal support award final, binding, and nonmodifiable.

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[5] The Court noted that it was reiterating the concept first expressed in *Pinka v Pinka*, 206 Mich App 101, 105-106; 520 NW2d 371 (1994), that the parties should clearly articulate their intent in the settlement and judgment regarding the modifiability of spousal support. *Pinka* was issued a few months after the divorce judgment here was entered.

[6] As a general observation regarding alimony in gross and periodic alimony, we note that periodic alimony "is designed to provide support and maintenance rather than to distribute property," which would be alimony in gross, and "only periodic alimony is subject to modification[;] [a]limony in gross is nonmodifiable." *Friend v Friend*, 486 Mich 1035; 783 NW2d 122 (2010). When alimony payments are deductible to the payer and that the payments are to be included in the payee's income, "[t]his suggests that the award is periodic alimony because alimony in gross is not a taxable event to the payee. However, periodic alimony is taxable to the payee." *Id.* When there are no contingencies such as death or remarriage, this suggests alimony in gross because "[p]eriodic alimony is typically terminated on the death or remarriage of the recipient[;] [a]limony in gross is not." *Id.* The *Staple* panel noted that the term "alimony in gross" is misleading, in that, it does not refer to a true alimony arrangement, but to "a property division by fixed, nonmodifiable installment payments" for which there is no statutory right of modification under MCL 552.28. *Staple*, 241 Mich App at 578 n 14. The Court stated that its ruling had "no effect on" alimony in gross arrangements. *Id.* Effectively, *Staple* stands for the rule that periodic alimony is *generally* modifiable unless the parties have clearly evinced an intent, reflected in the settlement agreement and judgment of divorce, to make the alimony nonmodifiable.

As reflected above, at the time of the settlement agreement, Michigan law was a mixed bag with respect to the modifiability of spousal support awards, applying either the bright-line test or the intent test. Under the bright-line test, explained above, the spousal support award would be deemed modifiable, considering that it contained a contingency for termination in the event of plaintiff's death. See *Staple*, 241 Mich App at 566; *Bonfiglio*, 202 Mich App at 63-64. Under the intent test of *Bonfiglio*, it would of course be necessary to ascertain whether the intent of the parties was to provide for modifiable or nonmodifiable spousal support, despite the inclusion of the death contingency. *Id.* at 64-65. The trial court, in finding that the parties' intent was to provide for nonmodifiable spousal support, relied on a debt provision in the settlement agreement, incorporated by reference into the divorce judgment, which provided that plaintiff's right to seek additional spousal support was reserved to the extent that she was obligated or threatened with suit to pay any marital debts that defendant was ordered to pay under the settlement. We question the court's reliance on the debt provision, which is narrowly tailored, to determine the parties' intent relative to the modifiability of spousal support. The debt provision contemplates creditors chasing after plaintiff, along with defendant's act of contempt under the divorce judgment in failing to pay those creditors, and the language provides a specific remedy under those circumstances. We find it tenuous at best to conclude that the parties intended to provide for nonmodifiable spousal support on the basis that the debt provision would have been unnecessary if the spousal support award were modifiable; we can envision a desire to include the debt provision even with modifiable spousal support. Furthermore, the spousal support award in the divorce judgment used the terms "support and maintenance," which tend to favor a finding of modifiable periodic spousal support. See *Friend v Friend*, 486 Mich 1035; 783 NW2d 122 (2010). We find that whatever ambiguity existed with respect to the parties' intent on the issue of modifiability, it was effectively, necessarily, and conclusively resolved in 2002-2003 when plaintiff voiced no qualms in regard to defendant's motion to modify spousal support, other than to challenge the merits of defendant's motion. Implicit in plaintiff's silence was recognition that the parties had no intent to provide for nonmodifiable spousal support.

Moreover, we find that the required analysis to resolve this appeal should not even be focused on the settlement agreement and divorce judgment. Given the procedural posture of this case, the proper analysis entails examination of the order modifying the divorce judgment in regard to spousal support. With the amendment of the judgment of divorce, the controlling or governing provision regarding all matters of spousal support was no longer found in the settlement agreement or the original divorce judgment; it was the new spousal support provision in the 2003 modification order. With respect to defendant's latest modification motion, he was not seeking modification of the judgment of divorce as it existed in 1994; rather, he was seeking modification of the amended version of the judgment as it existed after entry of the 2003 modification order.

The 2003 modification order, which was never appealed nor the subject of a motion to vacate or for relief from judgment, stated "that the Judgment of Divorce previously entered in this matter on February 28, 1994 shall be modified as follows[,]" and the order then set forth the

new spousal support provision.[7] The 2003 order not only decreased the amount to be paid, it also stated that the order would remain in effect "until further Order of the Court," indisputably reflecting the possibility of future modifiability and supporting the conclusion that spousal support was modifiable thereafter. *Flager v Flager*, 190 Mich App 35, 36-37; 475 NW2d 411 (1991) (alimony that is subject to "further order of the court" is periodic alimony that "is modifiable and terminable if a change in circumstances has occurred"). And, in regard to tax treatment, the order provided that the spousal support payments would be deductible for defendant and includible as income for plaintiff, which also suggests modifiable periodic spousal support. *Friend*, 486 Mich at 1035. Finally, the 2003 motion to modify support was contested, resulting in an adjudication by the court on a matter pertaining to spousal support; therefore, MCL 552.28 and the right to seek future modification applied. *Staple*, 241 Mich App at 569.

To the extent that the 2003 modification order could be viewed, in part, as a continuation or an adoption of the original consent divorce judgment, e.g., retaining language regarding termination upon death, such that there was a consensual element to the modification order, there can be no dispute that the order did not contain any language that the modified spousal support was final, binding, and nonmodifiable. *Id.* at 568 (*Staple* would have been applicable in 2003). Although the 2003 order reflected resolution of the pending modification motion absent consideration of any argument that spousal support was nonmodifiable, this was the fault of plaintiff in not raising the issue and effectively waiving it.

Reversed and remanded for a ruling by the trial court on the merits of defendant's motion to modify spousal support based on the evidence presented at the hearing. We do not retain jurisdiction. Having prevailed on appeal, defendant is awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

[7] In *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999), this Court noted that the defendant's failure to appeal the original divorce judgment precluded a collateral attack on the merits of the judgment and effectively constituted a stipulation to its provisions.